UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GEORGE G. HARRIS T/A WILDLIFE COLLECTION,	)	
Plaintiff,	)	
v.	)	No. 4:97-CV-01604 (ERW)
PAT WROB, et al.,	)	
Defendants.	)	

DEFENDANTS' POST-HEARING BRIEF

Introduction

While Plaintiff's Post-Hearing Brief (Doc. 61) is certainly noteworthy for its strong language and verbal pyrotechnics (*e.g.*, ***"Strike Three!"*** (*id.* at 6)), the most revealing aspect may well be the affidavit Mr. Harris filed with his Brief. (Doc. 62.) Tacitly conceding that the conduct at issue here may not be as "egregious" as Plaintiff contends, Mr. Harris tries to tarnish Mr. Wrob by attaching to his affidavit inadmissible third-party correspondence regarding an unrelated dispute with an unrelated Idaho company over an unrelated product line—a dispute amicably resolved more than ***14 years ago*** without litigation.[1]

Indeed, in the fog of Plaintiff's harsh rhetoric it is easy to lose sight of the fact that this dispute involves a few thousand dollars of sales (and zero profits) that occurred more than a decade after entry of the Consent Judgment. While Plaintiff struggles mightily to portray Pat Wrob as the Dr. Evil of Hat Pins, the ***undisputed*** facts demonstrated that by the time of entry of

[1] Moreover, it is an unrelated and resolved dispute that has no relevance to the current business practices of Defendants, who are parties to dozens of copyright and trademark licenses for their various products. (Tr. 65:7-15.)

that Consent Judgment in May of 1998, Defendants (a) had canceled their pending re-order with an Asian manufacturer for the hat pins covered by the Consent Judgment, (b) had hired a wildlife artist to create original new artwork to replace the disputed artwork, (c) had registered the copyrights in that new artwork, (d) had contracted with the Asian manufacturer to create new pewter and painted fish hat pins based solely on that new artwork, and (e) were in ***full compliance*** with the Consent Judgment. (Doc. 47-1at ¶¶4-17 (Wrob Decl.) and Exs. 1-4.)

Moreover, the evidence further suggests that the partial noncompliance occurred only within the last year as Defendants tried to closeout their remaining inventory of hat pins. Defendants have not shied away from admitting this noncompliance. As they conceded in their pre-hearing brief (Doc. 47) and again at the hearing, certain actions of theirs over the past year or so have been contrary to their obligations under the Consent Judgment. These violations were unintentional and regretted. Moreover, the principal violation—namely, the erroneous display of the enjoined images of eleven hat pins on the closeout page of Defendants' website—needs to be kept within perspective. The enjoined images, as shown in the catalog page attached as Exhibit A to the Consent Judgment, are each approximately three-quarters of an inch in size—and are even smaller on the website.[2] While Defendants regret their use of the wrong images for eleven of the many hat pins displayed on website pages accessible only to retailers, to label that error "egregious" is to lose all sense of perspective.

In short, Defendants did not profit from their actions, all of which occurred during their efforts to liquidate their remaining stock of hat pins at cost. The financial impact, if any, was inconsequential. By contrast, Plaintiff's alleged damages—all solely related to his fees and costs—are largely self-inflicted, beginning with his over-the-top demand letter in which he made

[2] The hat pins themselves are less than two inches in size.

"a one-time offer to settle this matter" for $115,000. (Def. Ex. 13.) That demand letter gave Defendants just three business days to accept:

> As noted above, this is a limited-time offer. If we do not receive your express acceptance of the terms of this offer by ***Tuesday, August 23***, we will proceed with legal action, and we will seek all remedies available.

(*Id.* (emphasis in original).) Given that Defendants' total sales of the hat pins at issue had been a couple thousand dollars during the relevant period, the $115,000 demand was absurdly excessive. When Defendants did not accept the take-it-or-leave-it proposal by the deadline, Plaintiff commenced this proceeding the following day. (Doc. 32.) Thus what could have been resolved reasonably and without much expense has instead mushroomed into a full-blown contempt proceeding through the overly aggressive behavior of Mr. Harris.[3]

STATEMENT OF PERTINENT FACTS

Because Plaintiff's Statement of Facts contains inaccuracies and distortions of the record and fails to describe nearly thirteen years of relevant conduct, we briefly set forth the facts pertinent to resolution of this dispute:

Defendants Went to Considerable Expense and Effort 13 Years Ago

In 1998, when resolving this lawsuit, Mr. Wrob's company, Rocking P, Inc. d/b/a Rivers Edge ("Rivers Edge"), hired an artist to create original, new designs for pins and magnets that would replace the enjoined pins and compete with those sold by Harris. (Tr. 43:25-44:12; 47:3-47:22.) Rivers Edge entered into a written contract with the artist in which Mr. Wrob's company would own the copyrights in these original new designs in exchange for payment to the artist. (Tr. 47:24-48:18.) Mr. Wrob registered the copyright in those new designs. (Tr. 48:19-48:21.)

[3] Ironically, Mr. Harris should have learned the lesson contained in the third-party correspondence he attached to his affidavit. That lesson is that these matters can be resolved if one proceeds prudently and without over-the-top threats.

Rivers Edge collected the remaining inventory of enjoined pins. Although the Consent Judgment did not require Rivers Edge to turn that inventory over to Mr. Harris or to destroy the inventory—despite Plaintiff's assertion to the contrary—Mr. Wrob believes he gave the old inventory of enjoined pins to Mr. Harris. (Doc. 29 (Consent Judgment); Doc. 47-1 at ¶15 (Wrob Decl.); Tr. 56:1-6.) Rivers Edge cancelled its already existing order for more enjoined pins, and placed an order for new pins—with the same Asian company—based on the new designs commissioned by Rivers Edge. (Tr. 50:18-51:1.)

There are no records of that transaction from thirteen years ago, but Mr. Wrob believes that the required minimum purchases would have caused Defendants to buy 2,400 pins of each design. (Tr. 50:2-17.) He estimated that he would have received six or seven hundred boxes of pins. (Tr. 68:9-68:15.) He thinks that he spot-checked those boxes when they arrived and noticed no problem with the order. (Tr. 54:24-55:1, 69:23-70:8.) He did not check every box. (*Id.*) For the next several years, the images of the pins advertised for sale in the Rivers Edge catalogs were images of the newly designed pins. At some point between 2004 and 2006, the catalogs stopped advertising all pins. (Tr. 45:17-25 & Ex. 8; Doc. 47-1 at ¶¶19-20 (Wrob Decl.).)

Defendants Complied with the Consent Judgment for 13 Years

During those thirteen years, Mr. Harris diligently enforced his rights by looking for potential acts of infringement and demanding that the infringers stop and pay him damages. (Tr. 31:9-24.) Mr. Harris continued to look at what Rivers Edge was doing during that thirteen-year period. (Tr. 32:9-10.) He saw Mr. Wrob at a number of trade shows. (Tr. 32:9-10.) At one such trade show, the Rivers Edge booth was probably 50 yards away from Mr. Harris's booth. (Tr. 32:10-13.) And, during this thirteen-year period of diligently investigating infringements of his rights, Mr. Harris discovered no conduct that caused him to think that he should investigate

Rivers Edge. (Tr. 33:16-34:19.) So, too, during all those years no customer of Defendants ever reported a problem with any of the hat pins or claimed that they had received the wrong version of a particular pin. (Tr. 71:1-13.)

Mr. Harris Discovers Enjoined Pins Mixed In With Rivers Edge Originals

By the spring of 2010, Rivers Edge had placed its remaining pin inventory on closeout. Because that inventory was only available for sale in bulk to retailers, the webpages on which the pins were advertised were in the password protected portion of the Rivers Edge website. (Doc.47-1 at ¶¶22-23 (Wrob Decl.).) At some point during a website update in April 2010 in connection with the inventory closeout, the wrong images for eleven of the hat pins were loaded onto website to advertise the remaining inventory. (Tr. 59:25-60:13.) As noted above, these images were less than one-inch in length. While Mr. Wrob had assumed that all of the pictures displayed on the website were pictures taken of the product available for sale, it appears that the images shown for eleven of the pins advertised on the closeout page of the Rivers Edge website in 2010 were images of enjoined pins. (Tr. 20:23-21:12.) This error occurred only on the webpage. There is no contention that the paper version of the Rivers Edge closeout catalog included any images of the enjoined pins.

In the spring of 2011, a friend of Mr. Harris suspected that he had found enjoined pins sold under the Rivers Edge name at a Missouri state park. At Mr. Harris's direction, his friend purchased three pins and sent them to Mr. Harris. (Tr. at 22:6-23:6.) Mr. Harris concluded that one of those three pins was an enjoined pin. (*Id.* & Tr. 29:16-19.) Nevertheless, he chose not to notify Rivers Edge at that time. (Tr. 35:15-36:12.)

Mr. Harris's friend then obtained access to the closeout webpage and ordered seventeen different types of pins. (Tr. 25:4-10.) He tried to obtain all eleven of the enjoined pins for which there were images on the website, but when he received the purchased pins, only six of seventeen pins appear to have been enjoined pins. (Tr. 24:23-25:10; 29:9-15; 29:23-25.) Again, Mr. Harris did not advise Rivers Edge at that time. (Tr. 35:15-36:12.)

Mr. Harris then looked on eBay for enjoined pins. He found a reseller who was advertising what appeared to be enjoined pins. He purchased eight different pin designs from the eBay reseller and subsequently discovered that the reseller had obtained these pins from Rivers Edge. (Tr. 23:7-28:12.) It appears that four of the eight pin designs Mr. Harris purchased from the eBay reseller were enjoined pins. (*Id.* Tr. 29:21-22.) Again, Mr. Harris did not advise Rivers Edge at that time. (Tr. 35:15-36:12.)

Mr. Harris's Take-It-or-Leave-It $115,000.00 Demand

Instead of promptly contacting Rivers Edge so that it could identify and correct the problem, Mr. Harris had his New York attorneys prepare a complete set of papers for a motion for contempt and then hired a set of local attorneys at Armstrong Teasdale to prepare to file the motion. (*Id.*) Only after that, did Mr. Harris have his attorneys send a demand letter to Rivers Edge. (*Id.*) That letter (a) did not state what designs were at issue, (b) did not state that there was any problem with the images on the website, and (c) did not state where the problem pins had been purchased. Instead, the letter presented Mr. Wrob with a take-it-or-leave-it $115,000.00 demand that would expire if not accepted in three days. (Tr. at 63:21-64:6 & Ex. 13 at 2 ("Provided you immediately agree by contacting the undersigned by telephone . . . our client has authorized us to extend you a ***one-time offer to settle*** this matter in return for a payment from you of ***$115,000.00*** . . . . If we do not receive your express acceptance of the terms of this offer ***by Tuesday, August 23rd***, we will proceed with legal action, and will seek all remedies available") (emphasis in original); *see also* Tr. at 63:9-63:20 & Ex. 13 at 1 ("the St. Louis law firm Armstrong Teasdale has been engaged in this matter, and is prepared to file the enclosed motion for contempt for violation of the Judgment unless we receive an acceptance to this offer of settlement ***by Tuesday, August 23, 2011***") (emphasis in original).)

Mr. Harris's demand letter appears to have been sent by fax at sometime on Thursday, August 18, 2011. (Tr. at 62:15-63:8 & Ex. 13.) That fax did not include any additional documents. (*Id.*) The hard copy, sent to arrive on Friday, August 19, 2011, included an unsigned copy of the memorandum of law but ***no*** declarations or exhibits. Mr. Wrob does not recall when he actually received copies of the fax or the letter and memorandum. (Tr. at 62:21-63:8; 63:18-20.) He does recall that he was not in the office much during that part of the summer. (*Id.*)

When Mr. Wrob had not agreed to pay Mr. Harris $115,000.00 by the end of the third business day (August 23, 2011), Mr. Harris's legal team filed the motion for contempt on the following day—this time with declarations, and exhibits. (Docket Entries 31-34, filed 8/24/2011.)

Mr. Wrob Responded Appropriately after Receiving
The Details and Support for Mr. Harris's Accusations

This Court sent a show cause order to Rivers Edge by certified mail, but it is standard practice at Rivers Edge to decline certified letters. (Tr. 64:13-65:6.) Mr. Harris eventually served Rivers Edge with his complete motion package. Mr. Harris obtained counsel and began investigating the allegations contained in those documents and responding to the court filings and deadlines as required.

On September 30, 2011, Mr. Wrob filed a declaration regarding the results of his investigation up to that point. His court filing stated that his investigation was continuing and asked for an opportunity to provide additional information as appropriate. (Doc. 47-1 at ¶3 (Wrob Decl.) & Doc. 47 at 1 (Initial Response to Show Cause Order).) Mr. Wrob submitted a

Declaration with that filing in which he declared to his belief and knowledge at that time that there were no enjoined pins in the Rivers Edge inventory. (*Id.*)

Promptly thereafter, Mr. Wrob started to have the company website images corrected. So, too, he personally commenced an examination of the remaining pin inventory by opening and going through each of the sealed boxes of product, one by one. (Tr. 51:18-53:17, 60:23-61:5.) He discovered that there were indeed two boxes of the enjoined pins in the inventory. (Tr. 53:18-25.) He does not know whether the Asian manufacturer intentionally or inadvertently included with its shipment of new inventory a few boxes of the old, enjoined inventory. (Tr. 54:7-15.) Mr. Wrob brought two boxes to the hearing on this motion. Both boxes contained pewter fly fisherman pins with the same item number, but one box contained the new, original designs Mr. Wrob had commissioned in 1998, while the other box contained enjoined pins. As the Court saw, there was no way to distinguish the contents of the boxes without opening them and examining the contents individually. (Tr. 51:11-53:5, 54:16-23.)

The Occasional Sales of Enjoined Pins Thirteen Years After the Consent Judgment Were a Small Part of Rivers Edge's Business and Accounted for Few Sales

Rivers Edge sells a thousand different products, many pursuant to copyright or trademark licenses with dozens of artists. (Tr. 44:20-45:3, 65:7-15.) Rivers Edge has approximately 7,000 customers, including Cabela's and Bass Pro Shops. (Tr. 40:21-41:5.) The pins at issue are a small part of Rivers Edge's business. (*Id.*) Due to changes in software and the lapse of time, Rivers Edge does not have access to its full sales records going all the way back to the entry of the Consent Judgment more than a decade ago, but it was able to submit a sales summary of pins at issue in Mr. Harris's motion papers. (Tr. 58:21-59:15; Doc. 47-1 at ¶10 (Wrob Decl.) & Ex. 5 (2010-2011 Select Pin Sales Summary).) Mr. Wrob testified at the hearing that ***all pin sales***—including sales of pins not covered by the Consent Judgment—going back as far as the Rivers

Edge records would go, were not more than $41,000. (Tr. 59:16-24.) As for the sales of the hat pins at issue—all sold during the closeout sale—the total revenues for all hat pins (including the ones covered by the Consent Judgment) have been less than one thousand dollars per year for the last two years. (Doc. 47-1 at ¶21 (Wrob Decl.).)

Mr. Harris put on no evidence of lost sales, damages or legal fees incurred in this action.

ARGUMENT

I. IN 1998, RIVERS EDGE DILIGENTLY CHANGED ITS ENTIRE INVENTORY TO NEW, ORIGINAL DESIGNS SO THAT IT WAS—AND WOULD BE—IN COMPLIANCE WITH THIS COURT'S CONSENT JUDGMENT, AND THE NONCOMPLIANCE THIRTEEN YEARS LATER WAS ACCIDENTAL AND DE MINIMIS.

Thirteen years ago, Rivers Edge went to considerable effort and expense to comply with this Court's order by commissioning original hat pin designs, removing the old inventory, purchasing new inventory, and developing new advertising for that new inventory. For nearly thirteen years, despite Mr. Harris's diligent scrutiny, there has been no noticeable instance of noncompliance until this past spring. Before August 18, 2011, Defendants had no reason to believe that they were not in full compliance with this Court's order.

Rivers Edge does not contest that it unintentionally failed to comply with this Court's order in 2011 by including some enjoined images on its website and selling some enjoined pins. But, back in 1998, Rivers Edge took all steps reasonably expected to make sure that this would not happen. The accidental promotion and sale of a few of the enjoined pins thirteen years later during a closeout of the inventory does not transform the original, diligent compliance efforts of Rivers Edge into contempt for this Court's Order. Nor can Mr. Harris's vague and unsupported assertions in an August 18th, take-it-or-leave-it demand letter for $115,000.00 transform thirteen years of compliance into contempt because it took Rivers Edge two months from the date of that demand letter to sort out what had happened.

Despite Mr. Harris's reliance on authority from other circuits, in the Eighth Circuit, when the movant proves a violation of the order by clear and convincing evidence, the burden shifts to the non-moving party to show that compliance is not possible. *Chao v. McDowell*, 198 F. Supp. 2d 1093, 1099-1100 (E.D. Mo. 2002). The non-moving party "must demonstrate: '(1) that they are unable to comply, explaining why categorically and in detail, (2) that their inability to comply was not self-induced, and (3) that they made in good faith all reasonable efforts to comply.' " *Id.* (quoting *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir.2001) (quoting *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 506 (8th Cir.2000))).

Where, as here, there is a thirteen-year period with no evidence—clear and convincing or otherwise—that Rivers Edge was not fully complying with this Court's order, this standard is challenged. Rivers Edge does not contend that it is impossible to comply with the Consent Judgment at issue. It did so for thirteen years, it is doing so again, and it is taking steps to make sure it will remain in compliance. Still, there is no doubt that if the overseas manufacturer of the pins shipped some of the prior enjoined pins with the new, original designs, the accidental sale of enjoined pins was not self-induced.

Likewise, the evidence is clear that Rivers Edge and Mr. Wrob took reasonable steps under the circumstances to comply with the Consent Judgment. They entered into a written contract and paid for new, original designs for pins. They cancelled the existing order for enjoined pins and ordered new pins. They turned over their existing inventory of enjoined pins (even though not required by the Consent Judgment). They did a random spot-check of the boxes of the new pins when they arrived to confirm that they had received the correct merchandise.

Given the number of pins and sales at issue, Rivers Edge and Mr. Wrob "made in good faith all reasonable efforts to comply." *Chow*, *supra*, 198 F.Supp.2d at 1099-1100 (citations omitted).

II. THERE IS NO EVIDENCE THAT PLAINTIFF SUFFERED ANY ACTUAL DAMAGES, AND HIS REQUEST FOR "COPYRIGHT INFRINGEMENT" DAMAGES HAS NO LEGAL BASIS.

Plaintiff put on no evidence of actual damages caused by Defendants' actions and, accordingly, does not try to contend that he is entitled to an award of compensatory damages. Nor does Plaintiff attempt to contest the undisputed fact that Defendants earned no profits from their actions, and thus Plaintiff does not contend that there are any wrongful profits to be disgorged. Having suffered no damages, Plaintiff instead propose that the Court award him statutory damages under Section 504(c)(1) of the Copyright Act, 17 U.S.C. § 540(c)(1).

Plaintiff's novel proposition has no basis in fact or law. There has been no finding of copyright infringement in this case. Indeed, there has not even been a judicial determination of what portion, if any, of Plaintiff's fish hat pins are protected by copyright. As we pointed out in our earlier brief (Doc. 47), Mr. Harris does not own a monopoly on the production and sale of pewter hat pins depicting fish and fishing flies, and he certainly does not own a copyright in what nature has created: "These ideas, first expressed by nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them." *Satava v. Lowry*, 323 F.3d 805, 812-13 (9th Cir. 2003). As Professor Nimmer explains, the appearance of objects and animals as they occur in nature is not protected by copyright. NIMMER ON COPYRIGHT § 13.03[B][2][6] (1999). At best, Mr. Harris may own a thin copyright in his two-inch reproductions of certain fish; but whether he actually owns such a copyright and whether Defendants' original designs infringe that thin copyright are matters of pure speculation, since he elected to settle his lawsuit before any hearing on the merits of his copyright claim.

Not surprisingly, Mr. Harris's grab bag of non-Eighth-Circuit cases provides no legal basis for his contention. His principal precedent, an unreported decision by the Eastern District of New York in the highly contentious litigation between Yash Raj Films, Inc. and Bobby Music Co., Cause No. 01-CV-8378, involved a contempt proceeding arising out of willful violations of a preliminary injunction. That injunction had been entered on the merits after an Order of Seizure resulted in the confiscation by U.S. Marshals of approximately 100 unauthorized copies of plaintiff's films in defendant's store. The post-judgment violations came to light after a police raid of defendant's premises resulted in the seizure of numerous additional counterfeit copies of plaintiff's copyrighted films.

The other three "precedents" involved trademark and counterfeiting cases. In two, the defendant had violated preliminary injunctions entered after hearings on the merits: *Vuitton Et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126 (2d Cir. 1989) and *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 96-cv-9721 (S.D.N.Y. 2002). The third—also a trademark case—involved significant ongoing violations of a consent judgment that had been entered on remand from an appeal of a permanent injunction. On the second appeal of that case, *Manhattan Industries v. Sweater Bee by Banff, Ltd.*, 885 F. 2d 1 (2d Cir. 1989), the Second Circuit affirmed an award to plaintiff of $147,199, which represented defendants' profits from more than $2.1 million in sales revenue from ongoing violations of the trademarks. The Second Circuit also affirmed that district court's decision to decline an award of any attorney's fees.

Here, in contrast to Plaintiff's precedents, there was ***never*** a hearing on the merits of the underlying claims, the Consent Judgment contains ***no*** finding of copyright infringement (or any wrongdoing), and the sales at issue totaled just a few thousand dollars and generated ***no*** profits.. Moreover, the Consent Judgment states that "nothing in this Consent Judgment shall constitute any admission by the parties, or their counsel." If Mr. Harris wishes to seek statutory (or other) damages for copyright infringement, he is asserting a hitherto unadjudicated claim and needs to file a new lawsuit. There is no factual or legal basis to award copyright infringement damages in this proceeding.

CONCLUSION

As stated above, Defendants regret their failure to comply with the terms of the Consent Judgment. However, the evidence shows that this noncompliance was inadvertent and occurred more than 13 years after Defendants took all measures they believed necessary to fully comply with the Consent Judgment.

For the foregoing reasons and those set forth in Defendant's pre-hearing court filings, and the evidence and arguments presented at the hearing, Defendants respectfully request that Plaintiff's motion be denied.

Respectfully submitted

/s/ Geoffrey G. Gerber

Michael A. Kahn (#35411MO)
mkahn@brickhouselaw.com
Geoffrey G. Gerber (#47097MO)
ggerber@brickhouselaw.com
The BrickHouse Law Group
PROFESSIONAL CORPORATION
1006 Olive Street, Ste. 303
St. Louis, Missouri 63101-2048
Tel: (314) 932-1070

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via the Court's electronic filing system on all counsel of record, this 12th day of December, 2011.

/s/ Geoffrey G. Gerber